

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD EISELE and U.S. POSTAL SERVICE,
POST OFFICE, Lewiston, ID

*Docket No. 01-469; Submitted on the Record;
Issued December 3, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to a schedule award for a permanent impairment of his back.

The Board has duly reviewed the case record and finds that appellant is not entitled to a schedule award for a permanent impairment of his back.

On February 9, 1976 appellant, then a 26-year-old letter carrier, filed a traumatic injury claim assigned number A14-106249 alleging that on that date he injured his lower back while pulling mail from the box.

The Office of Workers' Compensation Programs accepted appellant's claim for a lumbar strain and a herniated nucleus pulposus at L5-S1. Appellant received compensation for intermittent periods of total disability.

On March 11, 1986 appellant filed a claim for a schedule award for his back condition.

By decision dated May 9, 2000, the Office found that appellant was not entitled to a schedule award for a permanent partial impairment of the back. In a July 14, 2000 letter, appellant, through his counsel, requested reconsideration of the Office's decision accompanied by medical evidence.

In a decision dated October 12, 2000, the Office denied appellant's request for a merit review of his claim.¹

The Federal Employees' Compensation Act provides that compensation shall be paid for an employment injury when it results in total or partial disability for work.² The Act also provides for a payment of a schedule award for permanent impairment of specified members and functions of the body.³ However, as the Board has consistently held, there is no authority for paying a schedule award for an impairment of a portion of the body not enumerated in the schedule.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁵ no claimant is entitled to such an award.⁶ In this case, appellant is not entitled to a schedule award for his back.

¹ The Office claims examiner, in her October 12, 2000 decision, noted the July 5, 2000 report of Dr. Robert C. Colburn, a Board-certified orthopedic surgeon, which was submitted by appellant on reconsideration. Specifically, the Office claims examiner indicated Dr. Colburn's findings that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 50 percent impairment of the lower extremity compared to a 20 percent permanent impairment of the whole person. Dr. Colburn opined that using reverse logic, an impairment of 20 percent of the whole person was the equivalent of a 50 percent impairment of the lower extremity. He concluded that the impairment related to the condition for which he saw appellant in 1977 was equal to 50 percent loss of the lower extremity. Upon reviewing Dr. Colburn's report, the Office claims examiner stated:

"Although Dr. Colburn's July 5, 2000 opinion notes [appellant] has a 50 percent permanent ... impairment of the lower extremity versus his previous opinion of 20 percent permanent ... impairment of the whole person, there is no discussion as to which lower extremity or the physical/examination findings, such as range of motion, degrees of flexion/extension, etc. he used to reach such a conclusion. There is no discussion of sensory deficit pain or discomfort, loss of strength, or nerve root origin. There is no discussion as to the tables within the A.M.A., *Guides* used to arrived [sic] at the finding of 50 percent permanent ... impairment of the lower extremity or the Combined Values Chart. There is also no discussion as to the examination date from which the percentage of impairment was derived. Review of the case file notes the last medical evidence of record is that of Dr. Colburn dated June 15, 1983 and it annotates no physical/examination findings. There is a letter from Dr. Colburn, dated July 15, 1977, which notes that at that time [appellant] was last examined [on] July 6, 1977 and had increased range of motion with flexion of 70 to 80 degrees, etc., but this is a 20-plus-year-old report and not comprehensive."

The Office claims examiner concluded, "review of the case on the merits ... is not warranted." The Board, however, finds that in determining the weight or the probative value of medical evidence, the Office claims examiner was, in effect, performing a merit review of appellant's claim based on the new medical evidence from Dr. Colburn. The Office, therefore, conducted a merit review of appellant's case.

² 5 U.S.C. §§ 8105-8106.

³ 5 U.S.C. § 8107.

⁴ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁵ *See* 5 U.S.C. § 8107(c); *George E. Williams*, 44 ECAB 530, 533 (1993).

⁶ *E.g., Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.⁷

In this case, appellant contended that the Office erred by not issuing a schedule award for permanent partial impairment he sustained in the lower extremity that was causally related to his accepted back condition. In support of his contention, appellant submitted Dr. Colburn's July 5, 2000 report finding that he had a 50 percent permanent impairment of the lower extremity. Before the A.M.A., *Guides* may be utilized, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that, in obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment."⁸ Dr. Colburn's report is of diminished probative value because he did not identify which of appellant's lower extremities was impaired and he did not indicate any findings on examination. In addition, Dr. Colburn failed to refer to the specific tables in the A.M.A., *Guides* he utilized in determining that appellant had a 50 percent permanent impairment of the lower extremity.⁹ Further, there is no other medical evidence of record establishing that appellant has a permanent impairment of his lower extremities. Thus, the Board finds that appellant has failed to meet his burden of proof in establishing entitlement to a schedule award.¹⁰

⁷ *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

⁸ *Leisa D. Vassar*, 40 ECAB 1287 (1989).

⁹ *See Annette M. Dent*, 44 ECAB 403 (1993).

¹⁰ *See George E. Williams*, 44 ECAB 530, 533 (1993) (finding that the medical evidence was insufficient to support permanent impairment of appellant's lower extremities as a result of his spinal condition).

The October 12 and May 9, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 3, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member